ever, the theory upon which the recovery of the insurer is to be rested and consequently, the extent to which it should go, are disputed. An earlier English case stated that the insurer was entitled to everything recovered from the tortfeasor, on the ground that the insurer acquired the right against the tortfeasor through an abandonment. See *North of England Ins. Co.* v. *Armstrong*, 5 Q. B. 244, 248; *Burnand* v. *Rodocanachi*, 7 App. Cas. 333, 342. But it is to-day conceded on all sides that the right against a tortfeasor is not an incident of property, and therefore does not pass by a subsequent abandonment of the property. *The Livingstone*, 130 Fed. 746; *The St. Johns*, 101 Fed. 469, 472. See *Simpson* v. *Thomson*, 3 App. Cas. 279, 292. See 18 HARV. L. REV. 384. A better view would seem to be that the right rests on subrogation invoked to prevent the assured from recovering more than a full indemnity. See *Preston* v. *Castellane*, 11 Q. B. D. 380, 386; *Liverpool, etc. Co.* v. *Phoenix Ins. Co.*, 129 U. S. 397, 462. Under this view the insurance company becomes entitled to anything coming into the hands of the insured which reduces the loss indemnified. Still, the insurer clearly should not recover more than he has paid. *The Livingstone, supra.* See *The St. Johns, supra*, 475; 2 ARNOULD, MARINE INSURANCE, 9 ed., § 1229. See *contra, Railway Co.* v. *Jurey*, 111 U. S. 584, 594; *North, etc. Ins. Co.* v. *Armstrong, supra*, 249. And the reason underlying the subrogation would require that the insurer's right should not begin until the insured had made up his full loss. *Contra, The St. Johns, supra; cf. The Livingstone, supra*, 749. It is submitted that a "valued" policy of the type in the principal case should effect no change in this result: in such a policy the whole vessel is insured, the clause stating the agreed value being inserted only in order to save the expense and doubt that may attend a later investigation of value in case of loss. In this respect it resembles an agreement for liquidated damages, and is to be sharply distinguished from insurance of a certain amount taken on a vessel. An inquiry as to the actual value of the vessel for the purpose of reducing the recovery or of averaging the loss is, of course, not permitted. *Insurance Co.* v. *Hodgson*, 6 Cranch (U. S.) 206, 221; *Providence, etc. Co.* v. *Phoenix Ins. Co.*, 89 N. Y. 559; *Irving* v. *Manning*, 1 H. of L. Cases, 287. *Contra, Clark* v. *United, etc. Co.*, 7 Mass. 365. But the valuation is not binding for every purpose in which the value is brought into question. See *Burnand* v. *Rodocanachi, supra*, 335, 342; *Irving* v. *Manning, supra*, 305. Since in subrogation we must first see the insured made whole, and since actual value has been made the basis of recovery from the tortfeasor, that value and not the agreed value should be the basis of distributing the fund recovered. For this neither violates the contract nor protects the insured in any wrong. In the principal case, therefore, the plaintiff should have recovered only £6,900. The result reached, however, may be correct under § 79 (1) of the English Marine Ins. Act of 1906.

INSURANCE — MERGER OF PRELIMINARY AGREEMENT IN POLICY — PAROL EVIDENCE RULE. — The plaintiff's agent entered into a contract of insurance with the defendant company on terms not in accord with his principal's instructions. Before a policy was issued the property was destroyed. Subsequently the agent, not having been informed of the loss, though it was known to the plaintiff, induced the defendant to issue a policy on new terms that accorded with the latter's instructions. This policy was dated to take effect from the time of the original agreement. The defendant company sought to restrict recovery to the terms of the initial agreement, but the trial court disallowed evidence of this transaction on the ground that the policy contained the contract between the parties. *Held*, that the exclusion was proper. *El Dia Ins. Co.* v. *Sinclair*, C. C. A., 2d Circ. (not yet reported).

Since the agent was acting within the scope of his authority his failure to follow the plaintiff's instructions in the original transaction did not prevent a

contract arising between his principal and the defendant company. *North River Bank* v. *Aymar*, 3 Hill (N. Y.) 262. But his subsequent attempt to create a different contract and to incorporate it in the policy should have been held futile, since an original contract of insurance cannot be formed when the insured knows the property has been destroyed. *Wales* v. *Bowery Fire Ins. Co.*, 37 Minn. 106, 33 N. W. 322. Nor does it matter that when the policy was executed the plaintiff did not know it was a new contract, or that his agent did not know of the loss of the property, for the objection is not bad faith but lack of consideration. Thus the policy was absolutely void and could not become the written understanding of the parties by merging the oral contract. *Nebraska, etc. Ins. Co.* v. *Seivers*, 27 Neb. 541, 43 N. W. 351. *Cf. Pratt* v. *Dwelling House, etc. Ins. Co.*, 130 N. Y. 206, 217, 29 N. E. 117. Hence the defendant company did not seek to traverse the parol evidence rule by showing that the parties intended to make an agreement different from that summed up in the policy; its aim was simply to prove that the latter was not a contract because of the nonexistence of conditions required for the formation of a contract. *Pym* v. *Campbell*, 6 E. & B. 370. See 4 WIGMORE, EVIDENCE, § 2400. The resulting conclusion is that the court erred in disallowing evidence of the prior agreement to prove that the policy was an original agreement and void. *Salisbury* v. *Hekla Fire Ins. Co.*, 32 Minn. 458, 21 N. W. 552. *Contra, Ins. Co.* v. *Lyman*, 15 Wall. (U. S.) 664. Mistaking the parol evidence rule for a rule of evidence, when in fact it is a principle of substantive law, is the source of the error. See THAYER, PRELIMINARY TREATISE ON EVIDENCE, 397.

LANDLORD AND TENANT — CONDITIONS AND COVENANTS IN LEASES — IMPLIED COVENANT BY LANDLORD NOT TO INTERFERE WITH TENANT'S USE OF THE PREMISES. — In a lease was a covenant of quiet enjoyment by the landlord and a covenant by the tenant to conduct a restaurant on the premises. The landlord let adjoining premises to be used for noisy auction rooms. The tenant sues the landlord. *Held*, that he may recover. *Malzy* v. *Eicholz*, 32 T. L. R. 152 (K. B. Div.).

In an ordinary contract it is a condition to the promisee's right to enforce the promise that he does nothing to interfere with its performance. *Peck* v. *United States*, 102 U. S. 64; *European, etc. Co.* v. *Royal, etc. Co.*, 30 L. J. C. P. 247. Some cases hold that a promise by each party not to interfere with the performance of the other is necessarily implied from the express contract of the parties. *Patterson* v. *Meyerhofer*, 204 N. Y. 96, 97 N. E. 472; *Levy and Hipple Motor Co.* v. *City Motor Cab Co.*, 174 Ill. App. 20. See 17 HARV. L. REV. 46. It is true that in these latter cases the injury which the plaintiff complained of was the deprivation of the profits which he would have made, had he been able by performing his promise to put himself in a position to demand the performance of the defendant's express promise. But it cannot affect the implication of the promise, that the damages from its breach have no connection with the express contract. Some courts regard an interference by a landlord with the tenant's expected use of the premises as a breach of the landlord's covenant of quiet enjoyment. *Tebb* v. *Cave*, [1900] 1 Ch. 642; *McDowell* v. *Hyman*, 117 Cal. 67, 48 Pac. 984. *Contra, Tucker* v. *Du Puy*, 210 Pa. St. 461, 60 Atl. 4. And in England such an interference is also actionable as being a derogation from the grant of the landlord. *Grosvenor Hotel Co.* v. *Hamilton*, [1894] 2 Q. B. 836. But it is submitted that the principal case is best supported by implying, on the above principles of contracts, a covenant that the landlord will not interfere with the tenant's performance of his agreement to use the property in a certain way.

RENT CHARGES — ESTATE TAIL — EFFECT OF DISENTAILING ASSURANCE. — A tenant in fee simple of lands granted a rent charge issuable out of the